with breaking of windows described as being committed by the "union or its members" were against the plaintiffs and in favor of the defendants (R. 222).

I.

A.

Illegal Purpose of Union Activity Under the Sherman Act.

Under I, the plaintiffs accept our contention that the only kind of illegality that should be considered in the case at bar is the question of illegality under the Sherman Act. In substance, plaintiffs contend that under the case of *Apex Hosiery* v. *Leader*, the purposes of the defendant union were illegal *per se* under the Sherman Act in that they attempted to control price, attempted to suppress competition in marketing methods, and attempted to prevent persons from engaging in business enterprise except upon the terms dictated by defendants (Pages 10-23 of plaintiffs' brief are devoted to this general contention).

Plaintiffs now admit that the efforts of a union to organize an entire industry or efforts to increase wages or benefit workers which in turn "incidentally" raise the price to the consumer is not a violation of the Sherman Act (Pages 11, 12, 16).

But even the Circuit Court of Appeals squarely found that the *purpose of* the union was to organize the entire milk industry in Chicago (R. 367). *This is not price fixing* nor can it be construed as any of the evils prohibited by the Sherman Act. It is true that the Court at the same time said that this unionization of the entire industry was to be achieved by the elimination of cut-rate distributors from the City of Chicago. Plaintiffs' brief ignores the first part of the foregoing statement—but limits itself to the second part of this statement by the Circuit Court of Appeals.

Plaintiffs' argument that this effect of eliminating cut-rate producers is based substantially on the ninth finding by the District Court. From that *single* finding plaintiffs at various places in their Argument make the following contentions:

1. That all the other findings of fact made by the Master in favor of the defendants were properly disregarded by the Circuit Court of Appeals, and should also be disregarded by this Court.

2. The record should be treated as if the plaintiffs' system of distribution of milk was so much more progressive, economical and efficient than the system of the unionized dairies that it should follow as a matter of law that the plaintiffs are entitled to an injunction restraining any attempts of the union to preserve union scale working conditions, and to preserve jobs for union employees.

3. That the conduct of the defendant union in seeking to unionize non-union dairies would necessarily result in a change from the vendor system of milk delivery to stores, to the employee system of milk delivery to houses.

4. That it necessarily follows from this finding that any attempt by a union to unionize an industry where the effect of such unionization is to cause a change in the "employers' business" is necessarily such a restraint of trade as to constitute a violation of the Sherman Anti-trust Act.

5. That it necessarily follows from this finding that any attempt by a union regardless of its purpose which results in increase of price to the consumer due to the fact that a less efficient economic machine is created is necessarily a violation of the Sherman Act.

6. That under the *Apex* case, the problem before Federal District Courts on suits under the Sherman Anti-

trust Act is to determine whether or not the union purpose or goal is "sounder" from the judges' economic point of view than the purpose or goal of the employer.

7. That there can be no labor dispute within the meaning of the Norris-LaGuardia Act if the employers' economic thesis is accepted by the trial court and that of the union is rejected.

8. That there can be no picketing of any kind in a controversy between an employer and employee if interstate commerce is involved and if the employers' economic arguments are more persuasive than that advanced by the employees or union on their behalf.

The aforegoing represent *some* of the contentions made by the plaintiffs. But no argument is needed to show the errors in logic involved in such contentions.

We contend that:

(1) To accept this analysis and technique would be to reinstate the *Duplex Press* case decision even though it would be couched in the terms of the Holmes-Brandeis formula.

(2) To accept this analysis and technique would mean that every union dairy in Chicago could immediately discharge every one of its union employees and install the vendor system delivering solely to stores, and leave the union helpless, in that any attempt to reinstate the employee system of employees paid the union scale would be met by a suit in the Federal Court asking for an injunction under the Sherman Act.

(3) To accept this analysis and technique would mean the end of the closed shop in any single factory the products of which would be shipped in interstate commerce.

The union and its members are not opposing the vendor system in the abstract. The union seeks to protect its

hard earned gain against the *evils* of the vendor system; because

(1) its working conditions being so much inferior to union working conditions is an immediate threat to the preservation of *union conditions* in union dairies;

(2) its inferior working conditions is an immediate threat to the existence of *jobs* in union dairies by depriving union dairies of their business;

(3) and even if we assume that the working conditions were not inferior, and even if we assume that vendor and helper system are economically superior then the jobs of union employees are endangered.

Would the union be prevented from calling a strike in union dairies? According to plaintiff's argument such a strike would be prohibited by the decision in the Apex case. This is clearly *not* the law.

But here, too, the plaintiffs are making the same mistake as the Circuit Court of Appeals did in failing to recognize economic realities. The true economic facts are that the defendant union is trying to organize, *i. e.*, unionize, all distributors of milk in the City of Chicago. Plaintiffs now admit that *this* is not a violation of the Sherman Act. It does not follow that the unionization of all distributors of milk in the City of Chicago would necessarily eliminate cut-rate milk for the facts in the record show that union dairies sell cut-rate milk. As another step in economic logic, it can squarely be asserted that the dynamic appeal of economic competition among dairies, both in and outside the City of Chicago, will act as a constant spur to insure the maintenance of prices at a reasonable competitive level.

In addition, let us assume for the sake of argument that the unionization of all distributors would lead to the elimination of cut-rate milk. The elimination of sweat shop conditions in the clothing trades has tended to eliminate producers who merchanted their wares with-

out any regard for the share that labor was to receive in return for its use in the process of production.

In the early days in the coal industry, the marginal mine owner who produced his coal by employing underpaid help may have been able to sell his product to the public at a price lower than that paid for a product produced under "union" conditions. Would the attempt to unionize the mine be a violation of the Sherman Act since it tended to "fix" the terms and conditions of doing business?

Where would plaintiffs draw the line between those increases in price which are incidental (and therefore accordingly the union activity which would result in such price increase is not a violation of the Sherman Act) and union activity which would result in price increase which would be a violation of the Sherman Act?

This Court in the *Apex* case recognized the fundamental distinction between two situations: first, individuals getting together and fixing an arbitrary price of a product; second, the union which seeks to protect and better the working conditions of its members by seeking the unionization of an industry or an increase in wages. Insofar as the union seeks to unionize an entire industry, it is *not* controlling the price within the condemnation of the Sherman Act. It is not "dictating terms and conditions" within the language in the *Apex* case.

With regard to the general analysis and technique advanced by the plaintiffs, the closed shop in a single dairy in a sense tends to suppress competition, *i. e.*, it eliminates the open shop. The closed shop in a single dairy in a certain sense tends to prevent persons from engaging in business enterprises except upon terms "dictated" by the union. Does the Sherman Act condemn this union activity? Sections 6 and 20 of the Clayton Act

were passed in 1914 for the purpose of preventing the Sherman Act from being stretched to become an oppression of labor. The Norris-LaGuardia Act was passed in 1932 to make it clear to the Federal Courts that the purposes of Sections 6 and 20 of the Clayton Act should be carried out. To accept plaintiffs' argument is to disregard all these immunizing statutes. It is even in disregard of the purpose of Sherman Act as disclosed in the legislative history of the statute so clearly shown by this Court in the case of *Apex Hosiery* v. *Leader*.

Plaintiffs' exceptions to the Master's Report (R. 223-238) and their request for findings of fact and conclusions of law (R. 239-243) indicate that the facts with regard to price control, etc., were squarely presented to the Master and to the District Court, and that the tryers of fact rejected plaintiffs' contention. The record is bare of any evidence directly tending to show that the union was interested in price control. The facts clearly disclose that the union was interested in obtaining union scale for vendors and their *helpers,* not only of the plaintiff, Lake Valley Dairy, but also of the other non-union dairies in Chicago. That was the union purpose.

Plaintiffs' arguments with regard to contending that defendant union's attempts to unionize inevitably amount to price control, suppression of competition, dictation of terms, etc., is the new technique whereby under the language in the case of *Apex Hosiery* v. *Leader* employers will seek to escape unionization. Employers will now seek in every case to contend that the union is not interested in unionization of the industry, but is interested in something injurious to the consumer. The argument of injury to consumer is not a new argument so far as employers are concerned. Proponents of open shops have always contended that they are protecting the interests of the

consumer in having the open shop because under the closed shop the union dictates terms, conditions, etc.

But the true economic and common sense fact that human experience teaches us is that the employer is interested in profits for himself. This is natural. This is healthy. On the other hand experience also teaches us that the union is also interested in obtaining a fairer share of profits for the laborer. This too should be recognized as natural and as healthy.

To give the Sherman Act the interpretation contended for by the plaintiffs would be flying in the face of the provisions of Sections 6 and 20 of the Clayton Act. It would be in disregard of the purposes of the Sherman Act as shown by its legislative history. It would be squarely in violation of the legal principles stated in the Apex Hosiery case. It would be faulty economics. Lastly, it would be in disregard of the facts so eloquently shown not only in this record but in the records in other cases involving the milk industry in Chicago as cited in our brief at page 7.

We earnestly declare that to accept plaintiffs' contention that unionization of the entire industry amounts to price control, suppression of competition and the other evils condemned by the language of the Apex case would result overnight in the destruction of the union in Chicago. It would result in the discharge of union members by the union dairies and the installation of the vendor system with helpers. And the union would be helpless. This is not imaginative logic. These are cold, hard facts.

The weakness in plaintiffs' entire argument is indicated in the statement in the paragraph at the top of page 13 that the defendants "in effect contend". By this statement we see that plaintiffs are not citing the facts in the record. They are giving their interpretation of those facts.

At page 13 plaintiffs make reference to the statements of Assistant Attorney-General Thurman Arnold of November 20, 1939. This, of course, is an opinion by Mr. Thurman Arnold. His "letter" is not the "law." It is in conflict with the Holmes-Brandeis formula stated in the cases we cited in our brief. It is unsound economics. In the case of *United States* v. *Hutcheson,* pending on the docket of this court, the question whether a jurisdictional dispute between unions may constitute a violation of the Sherman Act is already presented for decision. We presume that plaintiffs' counsel was referring to that portion of the Assistant Attorney-General's opinion referring to modern progressive devices. In 8 International Juridical Ass'n Bulletin 53 (December, 1939) there is authoritative refutation of this contention relied on by plaintiffs. We respectfully refer the court to the discussion therein.

But in addition plaintiffs' premise is unsound on the facts. The trial court found that because of the relatively large amount of milk delivered to each retail store by the plaintiff dairy the cost of delivery is substantially less than the cost of delivery of milk on a retail route to the doorstep of the ultimate consumer. In addition, the District Court adopted the finding of fact made by the Master (R. 250, No. 15th). The Master's report finding No. 36 (R. 219-220) adopts the testimony of *defendants'* witnesses to the effect that they have for some time attempted to unionize the employees of the plaintiff dairies and other cut-rate dairies; that the picketing complained of herein is an effort to compel the vendors and wagon drivers employed by the plaintiff dairies to join the defendant union for the purpose of improving working conditions and wages of said vendors and employees of the plaintiff dairies and that the working hours and wage scales of plaintiff's dairy employees is lower than the union scale.

This was based upon the testimony of witnesses at the indicated places of the record.

It is undisputed and even shown by the testimony of plaintiffs' witnesses that the helpers employed by the vendors received wages much lower than the union scale. One of plaintiffs' witnesses described these helpers as young men and boys glad to get three or four dollars a day.

With respect to other cut-rate dairies in Chicago, other witnesses testified concerning the long hours.

The helpers were not protected by Workmen's Compensation insurance. They received no vacations. They received no seniority. They received no sick benefits. In other words, the non-union men gave up part of their rightful share of profits so that their "employer" could attempt to convince the public that *he* was more "efficient" than the union dairy.

To union employees such competition inevitably leads to loss of jobs. Plaintiffs claim that the union should be prevented from protecting its members by means of an injunction restraining an "illegal purpose."

B.

Interstate Commerce.

Under this heading, plaintiffs contend that all cases where the union purpose is shown to be price control or the suppression of competition, etc., the only question remaining is that whether interstate commerce is "involved." If interstate commerce is "involved" plaintiffs then argue that such conduct by the union *ipso facto* amounts to a violation of the Sherman Act.

Doesn't this argument abolish the distinction between State and Federal power? In our economic structure prac-

tically every activity impinges on or affects the commerce between the States. This argument would overrule the cases cited by us in our brief at pages 34-35. It is our contention that even assuming the purpose of a union is that condemned by the Sherman Act, nevertheless as a matter of statutory construction there still are local activities which do not come within the purview of the Sherman Act.

Under plaintiffs' argument a strike by the union employees of a union dairy employing several men would amount to a violation of the Sherman Act if the purpose of the strike was to eliminate the competition of cut-rate milk. This result would twist the language of *Apex Hosiery* v. *Leader* into a repudiation of the earlier principles of the cases cited by us at pages 34-35.

The activity must be more than "local."

II.

Labor Dispute Under Norris-LaGuardia Act.

Under this heading plaintiffs fail even to refer to Section 5 of the Norris-LaGuardia Act.

Plaintiffs admit that the courts have recognized the broadening concepts of the field of permissible labor union activity.

But plaintiffs though stating in words the recognition of the broadening concepts ignore the controversy in the case at bar in the milk industry between:

(1) The Lake Valley Dairy and the defendant union;

(2) The plaintiff C.I.O. industrial union and the defendant craft union; and

(3) The Lake View Cooperative and the defendant union.

The plaintiffs do not seek to comment upon our analysis of the provisions of Section 13 of the Norris-LaGuardia Act as stated in our petition at pages 25-29, nor do they distinguish the cases of this court cited at pages 29-33.

In addition, the analysis of the Circuit Court of Appeals' dissenting judge of the provisions of Section 13 of the Norris-LaGuardia (R. 376-378) indicates an even broader definition of labor dispute.

Plaintiffs under this heading use the same argument to show that the controversy was not a labor dispute within the meaning of the Norris-LaGuardia Act as they used under I, A, *supra,* to show that the union purpose was a violation of the Sherman Act.

The analysis and refutation of plaintiffs' argument that we have made under I, A, *supra,* applies doubly to explode plaintiffs' argument under this heading. It would be ironical to have a court hold that not only has the heavy hand of the Sherman Act been broadened by the *Apex Hosiery* case in so far as the burden of the Sherman Act on labor union is concerned, but that automatically the legislative intent of the Norris-LaGuardia Act has been rejected *sub rosa.*

The Norris-LaGuardia Act was born of the desire to remove Federal District Courts from the business of governing industrial disputes by the injunctive process of Federal equity courts. Plaintiffs would have this court disregard not only the terms of the Norris-LaGuardia Act but also thwart the legislative purpose as shown in our brief at page 40. Plaintiffs ask Federal District courts to determine whether or not a labor dispute exists by weighing the economic argument of the combatants. Plaintiffs here contend that the vendor system is more progressive, more efficient and more economical. Defendants say that the union scale of higher wages, shorter hours, sickness and benefit provisions, the collective bargaining power

presented by the united activity on the basis of a union tips the scales of social justice in their direction. Yet this weighing process was not contemplated or desired by the Federal Congress that passed the Norris-LaGuardia Act. As soon as this weighing process becomes evident the Norris-LaGuardia Act requires the Federal Courts to refuse to interfere by injunctive process. The economic struggle must be settled in the market place or in the legislature forum—not by an injunction.

At page 34 plaintiffs contend that if there is a violation of the Sherman Act there can not be a labor dispute as defined within the Norris-LaGuardia Act. This is unsound. The Norris-LaGuardia Act being passed subsequent to the Sherman Act, of course, supersedes the same. If Section 5 is controlling, then by its very words, it prohibits the Federal Court from issuing an injunction restraining the acts specifically described in Section 4. But we say there is no conflict. We say that Section 20 of the Clayton Act considered in connection with Section 6 *legalizes* certain activities of labor unions and their members. See our petition at pages 44-46.

The Norris-LaGuardia Act deprives the Federal Court of jurisdiction to enjoin the acts described in Section 4 thereof wherever a labor dispute is involved. If there is a labor dispute involved, it should necessarily mean that the action of the union was not such a restraint of trade as may be considered a violation of the Sherman Act. Interpreted in this manner the statutes do not conflict.

III.

Freedom of Speech.

With regard to reference to the First Amendment to the Federal Constitution, we refer the Court to page 48 of our petition. We refer expressly to the fact that a Fed-

eral equity court is here involved at page 47 of our petition and also at page 41 of our brief.

The Circuit Court of Appeals treated the question of freedom of speech as the question of the substantive law of the State (R. 369). It was with reference to that, that we cited cases under the Fourteenth Amendment.

With reference to the right to free speech at page 18, plaintiffs state that no peaceful picketing can exist without the presence of a labor dispute.

The decision in *Cantwell* v. *Connecticut,* 84 L. Ed. 836 cited at pages 45-46 in our brief with regard to picketing as not constituting breach of peace at the common law, is opposed to plaintiffs' contention.

In the case of *Carlson* v. *State of California,* 84 L. Ed. 668 in view of some of the recent decisions in the California lower courts, it is doubtful whether the dispute involved a labor dispute as construed by California courts. Yet this court held that the ordinance prohibiting the picketing involved was invalid under the freedom of speech clause.

The cases we cited at pages 42-44 of our brief are in substance squarely *contra* to this contention of the plaintiffs. To limit the constitutional right of freedom of expression, whether it is by carrying a banner or by distributing handbills or by advertising in the newspapers to those situations where there is a labor dispute would mean that freedom of expression would be destroyed in this country. This is not a case of regulation. This is a case of total prohibition.

Plaintiffs' contentions, pp. 37-40, that tne picketing must be for a lawful purpose would leave it open to the courts of the land to determine what purpose was lawful and what purpose was unlawful. The decisions of the said courts with regard to the nebulous standard of lawful purpose both in the past and at the present give us fair warning that once again Government by injunction would

be reinstated. Once again labor would find that courts had repeated their earlier errors. Cf. *Thornhill* v. *Alabama,* 84 L. Ed. at 665.

The argument seems to be made that a court decree by an injunction is different than an ordinance flatly prohibiting picketing in the sense that the court decree imposes no previous restraint. History of labor cases teaches us the never to be forgotten lesson that a court decision may restrain *all* picketing in the *future.* Under our theory of *stare decisis* a court decision restraining picketing on common law grounds receives a much broader interpretation by courts against the right of picketers than does a legislative act prohibiting picketing.

Consider the effect in Illinois of the Meadowmoor decision by the Illinois Supreme Court.

Defendants do not claim that there is an absolute right to picket in the sense that the state has *no* power to *regulate.* Defendants show the error in plaintiffs' contention that a Federal equity court has the power to prohibit all picketing. Picketing gives the public the opportunity of deciding between the competing claims of the plaintiffs and the defendants. The Federal Constitution guarantees to the public its privilege to be informed as well as guaranteeing the defendant union members the privilege *to* inform.

IV.

Relief for Plaintiffs.

The plaintiffs' argument here discloses that the injunction to prevent picketing is sought to "guarantee" business profits to plaintiffs. Reference is again made to "violence" as basis for injunction. We have already commented on the use of this argument.

Plaintiffs' admit that "many" of defendants' acts when separately viewed are "lawful."

Again, the nub of the case is revealed: is the purpose of unionization unlawful? Defendants say it is not.

Conclusion.

Defendants seek to protect their jobs and union working conditions by unionizing non-union dairies in Chicago. Plaintiffs' dairy, plaintiffs' cooperative and plaintiffs' union seek to avoid this unionization. The Sherman Act has not been violated by defendants. The Norris-La Guardia Act precluded the District Court from granting an injunction against defendants. In any event the Federal Constitution guarantees the defendant union members the right to inform the public that a controversy exists in the milk industry between plaintiffs and defendants.

Wherefore defendants (petitioners) respectfully pray that the judgment of the Circuit Court of Appeals for the Seventh Circuit should be reversed, and the cause remanded to said court with directions to affirm the decree of the District Court.

Respectfully submitted,
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